BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network	)	
Information and Other Customer	)	
Information;	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As	)	
Amended	)	
	)	
2000 Biennial Regulatory Review –	)	
Review of Policies and Rules Concerning	)	CC Docket No. 00-257
Unauthorized Changes of Consumers'	)	
Long Distance Carriers	)	

COMMENTS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

The Public Service Commission of the State of Missouri ("MoPSC") offers the following comments in response to the Federal Communication Commission's ("Commission") Notice of Proposed Rulemaking (NPRM) published September 20, 2002 in 67 FR 59236. The NPRM seeks comment on questions relating to: A) Regulation of Foreign Storage of and Access to Domestic CPNI; B) Protections for Carrier Information and Enforcement Mechanisms; and, C) CPNI Implications when a Carrier Goes Out of Business. While not having a position on most issues addressed in the NPRM, with the recent bankruptcies, mergers and asset sales, the questions addressing CPNI implications when a carrier transfers customers due to cessation of operation or as part of a bankruptcy settlement are of particular interest to the MoPSC.

The NPRM notes, "In light of inquiries the Commission has received in the face of recent carrier bankruptcies, mergers, and asset sales, the Commission seeks comment on carrier use and disclosure of CPNI when it sells its assets or goes out of business."[1] More specifically, the NPRM seeks comment on whether CPNI should be used for transition of customers to another carrier, and if so, if customer notification should make note that such CPNI data is being transferred to the new carrier in compliance with the Commission authorization and verification (slamming) rules.

The MoPSC suggests that it is a matter of sound public policy to use CPNI for transition of customers to another carrier. Customers should experience a smooth transition from one carrier to another in all instances, but especially in transitions beyond the customers' control such as when the carrier is ceasing operation or in bankruptcy. Section 222 of the Telecommunications Act of 1996 (the Act) does not prohibit this use of CPNI, as a telecommunications carrier has explicit authority to use CPNI to provide telecommunications services if the CPNI is derived from those services. In the transition process, the CPNI relates to the services the exiting carrier was providing and should be transferred to the new carrier, and only that new carrier, for the continued provision of those services.

> **Section 222. Privacy of customer information.**
> (c) Confidentiality of customer proprietary network information.
> (1) Privacy requirements for telecommunications carriers. Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

[1] *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers.* Third Report and Order and Third Further Notice of Proposed Rulemaking. FCC 02-214. para. 146.

The MoPSC also suggests it is in the public interest for the Commission to require the exiting carrier to provide the customer with advance notice of the transfer of CPNI data. Consistent with the Commission's Third Report and Order, customer notification at the time of the transfer "must be comprehensible and must not be misleading…[and] must be clearly legible, use sufficiently large type, and be placed in an area so as to be readily apparent to a customer."[2] Further, any opt-in/opt-out authorizations the customers previously executed with the exiting carrier should be transferred to the new carrier automatically, thereby ensuring that customers maintain their privacy interests by protecting this information from disclosure and dissemination. Section 222 of the Act neither mandates nor waives a requirement that the new carrier must provide notice and obtain approval for CPNI use and disclosure from its newly acquired customers, so the MoPSC asserts a CPNI notification requirement upon transfer of customers and the subsequent transfer of any opt-in/opt-out authorizations should be within the legal discretion of the Commission as a policy decision.

The NPRM also asks if carriers can sell CPNI as an asset. If the Commission does not allow CPNI to be sold as an asset, the NPRM questions if such a limitation is constitutional and within the scope of the Commission's authority under section 222 of the Act. Section 222 states CPNI is limited to use for the provision of telecommunications service or for "services necessary to, or used in, the provision of such telecommunications service". This limitation indicates the CPNI information should automatically pass with the customer to the appropriate successor telecommunications carrier, because that is the entity providing telecommunications service, and not be sold as an asset of the exiting company.

To address questions on the scope of the Commission's authority, it is necessary to review the U.S. Court of Appeals decision in *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. Aug. 18, 1999). The Tenth Circuit held that the Commission's original customer approval rules violated the First

[2] Id at para. 89.

Amendment of the U.S. Constitution by restricting protected commercial speech. The Court analyzed the Commission rules under a four-part framework set forth in Central Hudson. See *Central Hudson Gas & Elec. Corp. v. Public Service Commission of the State of New York*, 447 U.S. 557 (June 20, 1980). The Court in *U.S. West* described the *Central Hudson* test:

> We analyze whether a government restriction on commercial speech violates the First Amendment under the four-part framework set forth in *Central Hudson*. First, we must conduct a threshold inquiry regarding whether the commercial speech concerns lawful activity and is not misleading. See *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343. If these requirements are not met, the government may freely regulate speech. See *Went For It*, 515 U.S. at 623-24, 115 S.Ct. 2371; *Revo*, 106 F.3d at 932. If this threshold requirement is met, the government may restrict the speech only if it proves: "(1) it has a substantial state interest in regulating speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest." *Revo*, 106 F.3d at 932 (citing *Central Hudson*, 447 U.S. at 564-65, 100 S.Ct. 2343).

The Court strictly applied the *Central Hudson* test in finding that the Commission did not meet its burden of proof. Any regulation on this topic must fulfill this test to withstand First Amendment scrutiny.

Any regulation in this arena must also withstand a Fifth Amendment takings analysis. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), sets the general thresholds a regulation must meet. The Supreme Court identified three factors to be taken into account in determining whether government action has gone beyond regulation and effects a taking: the character of the government action, its economic impact, and its interference with reasonable investment- backed expectations. *Id.* at 1005. In that case, the Supreme Court found that as long as Monsanto was aware of the conditions under which its data are submitted, "and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." *Id.* at 1007.

In the case of customers being transferred to a new carrier due to a bankruptcy proceeding or the cessation of operation of the exiting carrier, the CPNI remains in private hands throughout the process, but Congress has statutorily limited the use of that CPNI. If regulations do not go beyond the intended use that Congress has set, the regulations should fulfill this analysis and any determination that CPNI should not be sold as an asset would be within the scope of Commission authority.

In summary, the MoPSC respectfully submits these comments to suggest that CPNI and any opt-in/opt-out authorizations executed by customers should be automatically transferred to the new carrier when a carrier sells its assets or goes out of business. Consistent with the CPNI requirements outlined in the Third Report and Order and Third Further Notice of Proposed Rulemaking in CC Docket Nos. 96-115, 96-149 and 00-257, customers should receive notification of the transfer of CPNI.

Respectfully submitted,

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